UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: January 9, 1992

FAA Order No. 92-3

In the Matter of: JAMES PARK	Docket No. CP90EA0133

DECISION AND ORDER

Respondent James Park ("Respondent") has appealed from the oral initial decision issued by Administrative Law Judge Joel R. Williams at the conclusion of the hearing held on April 16, 1991, in New York, New York.[1/] The law judge held that Respondent had violated Section 91.8(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 91.8(a) (1988) [presently designated as 14 C.F.R. § 91.11],[2/] but reduced the civil penalty sought by Complainant from $2,000 to $1,000.

On April 25, 1988, Respondent was a passenger on a Pan Am flight from Rome to New York, on which he was assigned a non-smoking seat. During the flight, he went to the rear of

---

1/ A copy of the law judge's oral initial decision is attached.

2/ Section 91.8(a) of the FAR, 14 C.F.R. § 91.8(a) (1988), provided as follows:

> § 91.8 Prohibition against interference with crewmembers.
>
> (a) No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated.

the airplane where he stood by the emergency exit, smoking a cigarette. The senior flight purser[3/] on the flight testified that the other purser contacted her and reported trouble with a verbally abusive passenger in the rear cabin.

The senior flight purser recalled that Respondent was standing and smoking at the rear of the airplane. According to the purser, it was dangerous to allow passengers to stand and smoke in the rear of the aircraft. She testified that when she politely informed Respondent that he could not stand at that location and smoke, he replied that he would do what he wanted. She further testified that after she warned Respondent that she would have to get the captain, he shoved her. The purser recalled that Respondent then threatened, "What is it you want? Do you want me to rape you?" Tr. at 15. The purser testified that she was very angry and frightened, and that she believed Respondent was capable of violently hurting her. She stated that other passengers on board were concerned with Respondent's behavior, and that Respondent had been asking other passengers if they had a knife or shotgun. She added that Respondent acted irrationally during the flight, issuing statements such as "Tomorrow a plane is going to go down--a Pan Am plane--and everyone will die." Tr. at 17. The purser

---

3/ At the hearing, the senior flight purser testified that a flight purser is in charge of the flight attendants, documentation, and money on a flight; he or she is also responsible for communication between the flight crew and the flight attendants.

testified that she spent approximately 10 to 15 minutes dealing with Respondent before she went to get the captain.

The captain testified that when he went back to talk to Respondent, he warned Respondent that he was engaging in illegal conduct and that physical contact with a flight attendant violated federal law. The captain then returned to the cockpit. He testified that he was outside the cockpit for approximately 5 to 10 minutes. A short time later, the captain received a call on the interphone system advising him that Respondent was again becoming unruly. He dispatched the first officer to investigate the situation.

Respondent was smoking when the first officer encountered him at the rear of the airplane. The first officer testified that he warned Respondent that it was against the law to stand and smoke in the aisles or the doorways, and that he would have to return to his seat. Following several minutes of discussion, the first officer advised Respondent that if he did not stop smoking and return to his seat, he would be handcuffed. When Respondent questioned the first officer's authority, the first officer sent the senior flight purser to the cockpit to get handcuffs and a pilot from another airline who was riding in the cockpit because the plane was full. The first officer and the other pilot handcuffed Respondent and returned him to his seat. The first officer testified that he was outside the cockpit for 15 to 20 minutes.

Respondent testified that a flight attendant approached him and, instead of requesting that he put out his cigarette, jumped on him and pushed him. Respondent admitted that he "got a little excited" when the flight purser came to tell him to put out the cigarette. Tr. at 82. According to Respondent, he put out the cigarette, but the whole crew "ganged up" on him. Id. If he had been asked politely to put out his cigarette, claimed Respondent, this case would never have come to hearing.

The law judge stated that he had no doubt that Respondent violated the regulation. The law judge found that Respondent was smoking when he was told not to smoke and that Respondent pushed, threatened, and caused a commotion requiring the attention of the captain, the first officer, and the purser. The law judge reduced the civil penalty from $2,000 to $1,000 because the maximum penalty for each violation is $1,000 and Complainant had proven only one violation.

The record establishes that Respondent filed a timely notice of appeal from the oral initial decision rendered by the law judge on April 16, 1991, but did not file anything further with the Appellate Docket within the 50-day period after the law judge rendered his decision. See 14 C.F.R. § 13.233(c), which requires that a party perfect his or her appeal by filing an appeal brief within 50 days after entry of the initial decision on the record. On September 11, 1991, the Administrator held that Respondent's three-page notice of

appeal satisfied the requirements for an appeal brief[4/] and that Respondent's appeal would be considered perfected. In the Matter of James Park, FAA Order No. 91-45 (September 11, 1991). The Administrator gave Complainant 35 days from the issuance of the order to file its reply brief.

On October 17, 1991, Respondent served a request for additional time to file his appeal brief and enclosed his appeal brief. Respondent explained in the request that he did not receive FAA Order No. 91-45 because his address was misspelled on the envelope. Complainant has filed a motion to strike, arguing that: (1) the Rules of Practice specifically provide that a party may not file more than one appeal brief; (2) Respondent has not received leave to file an additional brief and has not shown good cause for his additional brief; and (3) in any event, the majority of the arguments set forth by Respondent in the additional brief were contained in his initial appeal brief.

Under the Rules of Practice, "[a] party may not file more than one appeal brief or reply brief." 14 C.F.R. § 13.233(f). The Rules of Practice further state that:

> A party may petition the FAA decisionmaker, in writing, for leave to file an additional brief and shall serve a copy of the petition on each party. The party may not file the additional brief with the petition. The FAA decisionmaker may grant leave to file an additional brief if the party demonstrates

---

4/ In the appeal brief, a party must set forth, in detail, the party's specific objections to the initial decision, the basis for the appeal, the reasons supporting the appeal, and the relief requested on appeal. Section 13.233(d)(1), 14 C.F.R. § 13.233(d)(1) (1991).

> good cause for allowing additional argument on the appeal.

Id. (Emphasis added.)

Respondent has failed to show good cause for allowing additional argument. Respondent says only that because his address was misspelled, FAA Order No. 91-45 did not reach him until September 25, 1991. In FAA Order No. 91-45, however, the Administrator construed Respondent's notice of appeal as an appeal brief as well as a notice of appeal, and did not grant Respondent additional time to file his appeal brief. The misspelled address does not explain Respondent's failure to file, within 50 days after entry of the law judge's decision on the record, either a separate appeal brief or a request for extension of time to file his brief. Consequently, Complainant's motion to strike Respondent's additional appeal brief is granted.

Respondent's appeal focuses on three issues. First, Respondent argues that the law judge failed to give him an opportunity to present a final oral argument at the hearing. Complainant responds that Respondent waived final oral argument by remaining silent and failing to ask the law judge for the opportunity to present final oral argument. Complainant further contends that even if the law judge did err by failing to give Respondent the opportunity to present final oral argument, Respondent was not prejudiced by the law judge's error.

Section 13.231(b) of the Rules of Practice provides that parties are "entitled" to submit final oral argument.[5/] The rule provides further that parties may waive final oral argument. 14 C.F.R. § 13.231(b) (1991).

At the conclusion of Respondent's sworn testimony, the law judge asked, "Do you have a closing argument?" It is unclear from the hearing transcript if the law judge directed this question to both parties or only to the agency attorney. Only the agency attorney answered affirmatively. After the agency attorney gave his final oral argument, the law judge asked him several questions about the amount of the proposed civil penalty. The law judge then rendered his oral decision and adjourned the hearing.

It appears that Respondent waived his right to present final oral argument by remaining silent. Moreover, even if Respondent did not intend to waive his right to final oral argument, any error the law judge may have committed was harmless. When the law judge asked if counsel had a closing argument, Respondent had just finished testifying, and much of Respondent's direct "testimony" was actually argument.

5/ Section 13.231(b), 14 C.F.R. § 13.231(b) (1991), entitled "Final oral argument," provides:

> At the conclusion of the hearing and before the administrative law judge issues an initial decision in the proceedings, the parties are entitled to submit oral proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. At the conclusion of the hearing, a party may waive final oral argument.

Respondent also has not demonstrated that he had anything additional to offer during final oral argument that would have changed the law judge's decision.

Respondent next argues that Complainant's witnesses were not credible. He contends that many of the crewmembers' written statements were inconsistent, noting that some of the statements indicate that Respondent was smoking in the left rear of the aircraft, while others indicate that he was smoking in the right rear of the aircraft. Respondent suggests that the captain compelled the crewmembers to make false statements against him. Complainant responds that the inconsistencies are inconsequential and provide no basis for disturbing the law judge's credibility determinations, which are entitled to deference on appeal.

While an agency is not inextricably bound by the credibility findings of its law judges, those findings are entitled to special deference on review by the agency. In the Matter of Carroll, FAA Order No. 90-21 at 12 (August 16, 1990), citing Mattes v. United States, 721 F.2d 1125, 1129 (7th Cir. 1983). Law judges are in the best position to evaluate the demeanor of the witnesses. Id.[6/]

6/ See also In the Matter of Terry & Menne, FAA Order No. 91-31 at 2 (August 2, 1991), holding that deference will be accorded the law judge's credibility determinations in determining whether his or her findings of fact are supported by a preponderance of the evidence.

Respondent has offered no persuasive reason for disturbing the law judge's credibility determinations. The only inconsistency in the witnesses' accounts cited by Respondent concerns whether he was smoking in the left or right rear of the aircraft. This inconsistency is insignificant and does not justify disturbing the law judge's credibility findings.

Finally, Respondent complains that certain other witnesses to the incident--specifically, a passenger seated next to him and two flight attendants--were not present at the hearing. Complainant responds that Respondent could have obtained a subpoena to compel those persons to attend the hearing, and it was his own fault if he failed to do so.

Complainant is correct that under the Rules of Practice, a party may obtain a subpoena to compel the attendance of a witness at a hearing.[7/] It was Respondent's responsibility to ensure that any individuals whose testimony might have advanced his cause were present. He cannot now claim error because he failed to do so.

7/ Section 13.228(a) of the Rules of Practice, 14 C.F.R. § 13.228(a) (1991), provides, in pertinent part: "A party may obtain a subpoena to compel the attendance of a witness at a deposition or a hearing ...."

Accordingly, Respondent's appeal is denied and the law judge's initial decision is affirmed. A civil penalty of $1,000 is assessed.[8/]

BARRY LAMBERT HARRIS
Acting Administrator
Federal Aviation Administration

Issued this 8th day of January, 1992.

8/ Unless Respondent files a petition for reconsideration within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1991).